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In the United States Court of Appeals

For the Seventh Circuit

No. 11903

MINNIE KRANTMAN,
Plaintiff-Appellant,

vs.

LIBERTY LOAN CORPORATION, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Honorable
J. Sam Perry,
Trial Judge.

APPENDIX TO APPELLEES' BRIEF.

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APPENDIX.

ABSTRACT OF TESTIMONY OF WITNESSES.

The following abstracts are deemed necessary to correct inaccuracies and to supply omissions in the Appendix to Appellant's Brief. For convenience, they are grouped under references to pages in Appellant's Appendix.

TESTIMONY OF WAYNE STRUVE BOUTELL (Tr. 66)

Cross Examination by Mr. McNally (Tr. 92).

The computations that I made were taken wholly out of the proxy statement (Plaintiff's Exhibit 3) that was sent to the stockholders of Liberty before the Plan of Merger, and out of the Baumann-Finney audit (Plaintiff's Exhibit 20) (Tr. 95).

TESTIMONY OF I. H. LEVY

Direct Examination by Mr. Stevens (Tr. 201).

Appellant's Appendix, p. 8:

* * * In March, I went to St. Louis on Liberty's business and I talked to Mr. Lichtenstein at my hotel (Tr. 205). He told me he couldn't make any kind of commitment about coming to Liberty because he was employed by American Investment Company, and therefore he could not consider any kind of a proposition (Tr. 205-6). * * * There was somewhat of a discussion of the sale of half of my shares of stock, but he said he wasn't in any position because he was still employed by American (Tr. 206). * * * There was a discussion at the meeting on May 26 of the sale of part of the shares of stock held by me

to Lichtenstein and also a discussion of the reclassification of the 7500 shares of B stock into 100,000 shares of common. There was no discussion about obtaining the cooperation of brokers in soliciting A stockholders (Tr. 209). In March, 1954, I had a discussion in Mr. Nix's office with Mr. Nix, Mr. Harris, Mr. Costigan, and also with Mr. Thompson and Mr. Gerhard of Seaboard Finance Company, regarding a deal with Seaboard during which there was some discussion about Lichtenstein coming with Liberty and I informed them that Lichtenstein had told me he wasn't interested as long as he was in the employ of American (Tr. 210-11). * * *

There was a discussion of whether it would be practical for Lichtenstein and myself to divide the Class B stock, one-half to each, and also a discussion of a reclassification of the stock. Mr. Maland, of Chapman and Cutler, advised me that I should not be a party in any way to any reclassification of the B stock, and the deal was off. Upon Costigan's suggestion that he should buy all the B stock of my group and my family, Maland said, "That is entirely up to Mr. Levy, if he wants to do that, to go ahead and do it". (Tr. 212-3).

Appellant's Appendix, p. 9:

Mr. Dolliver, President of Family Finance, said they were willing to pay $1,800,000 for the B stock "which would be the management control of the company" and then merge with Liberty (Tr. 215). Mr. Barnes of American Investment Company talked to me about the same time concerning the purchase of the B stock for $1,700,000, which would give them management control of Liberty (Tr. 216). * * * I didn't inform Strilky of the price I was getting for my shares. He figured that out himself. He knew what the total price was, $1,700,000 (Tr. 222) * * *.

I purchased 9 shares of B stock from Fairman, Harris & Company, who said that they had come on the market and asked if I wanted to buy them. I think I paid $230 per share. This occurred subsequent to the option agreements of July 8 and prior to November 3, 1954 (Tr. 223; 225; 246). I purchased 43 shares of B stock which had come on the market in March or April of 1954 at $20 or $21 per share (Tr. 223; 246-7), but these shares didn't mean anything to me because my wife and daughter and I had the management control of the company. It just came into the market. I didn't need it (Tr. 223).

Appeliant's Appendix, p. 10:

In this industry we depend a great deal on bank credit and borrowing power from banks and insurance companies and on acquainting security dealers with the value of our securities. At the present time Liberty has a net worth of about $8,500,000. Its lines of credit with bankers are over $29,000,000 and we are borrowing about $25,000,000 to $26,000,000. We are also borrowing from insurance companies about $6,500,000. To summarize, banks and insurance companies have four times more money invested in Liberty's business than its stockholders (Tr. 225-6). We have two audits a year and reports are sent to the banks and insurance companies and it has been my job as a part of the top management to call upon the banks and insurance companies and answer all questions that they have about the business. These borrowings from the banks and insurance companies are all unsecured and without collateral. The First National Bank of Chicago gives a $2,000,000 line of credit, the Continental $1,250,000, the Northern Trust $750,000, the Harris Trust $500,000 and there are many smaller banks. We have lines of credit in St. Louis, Detroit, Cleveland, New York, Phila-

delphia and Washington (Tr. 226-7). Since Lichtenstein came into the picture our business has greatly expanded so that we need new lines of credit, which is part of my job (Tr. 227-8) * * *. We keep a file in St. Louis on the banks so that we can follow them up. We want many banks to know about the company because it is expanding and growing and we are constantly looking for new funds. This is a money business (Tr. 230).

Lichtenstein wanted me to stay and also Strilky and H. H. Levy (Tr. 231-2). * * *

I have a private office in Liberty's offices at 111 West Jackson Boulevard. I also have a secretary who does a lot of other work around the Liberty office too (Tr. 234). * * *

Appellant's Appendix, p. 11:

There was no discussion about reserving any salary for Lichtenstein until the disposition of this suit or as to what the amount would be (Tr. 253).

Appellant's Appendix, p. 12:

Prior to the date when Lichtenstein informed Maland that they were forming Key Finance Corporation, I believe I had only one conversation with Lichtenstein about the sale of my interest. This was May 27 when there was a discussion of the purchase of all the shares (Tr. 256). Prior to that date we were exploring different things, but Lichtenstein always informed me that he could not discuss anything so long as he was employed by American (Tr. 257). It was all exploratory and never became serious until May 26 after he was no longer employed (Tr. 259). * * * I had another discussion with Lichtenstein in February, but the B shares weren't even mentioned (Tr. 260).

Those proxies were all voted in favor of the merger and reclassification of shares except that where the proxies indicated that the stockholder wanted to vote against the merger and reclassification, such proxies were so voted. The proxies that were not designated one way or another were voted in favor of the reclassification and merger, as was stated in the Proxy Statement (Tr. 262).

Appellant's Appendix, p. 13:

A lot of bankers know Mr. David Lichtenstein, know his reputation as a small loan operator, and he enjoys a very fine one (Tr. 275).

I met with Mr. Lichtenstein a number of times prior to May 26, 1954, but we did not discuss the sale of stock at all of those meetings. We discussed generalities and what could be worked out if he came with Liberty. I was very anxious to get him to join Liberty, but he kept informing me he was still employed with American (Tr. 283). At one of those meetings we may have discussed his purchase of some of this B stock, but we never got serious on anything until May 26 (Tr. 287-8).

Appellant's Appendix, p. 14:

Cross Examination by Mr. Strachan (Tr. 288).

I knew that as part of the terms of the merger on which I voted as a Class A stockholder the B stock was to be reclassified (Tr. 288-9). * * * My wife and I and daughter had approximately two-thirds of the B stock and would have received about 40,000 shares of the Seaboard preferred (Tr. 291).

Severance arrangements were worked out for both Strilky and H. H. Levy (Tr. 294).

The deal which I negotiated and carried out with Key Finance Company did not involve any reclassification of the B stock (Tr. 295).

Appellant's Appendix, p. 15:

Cross Examination by Mr. McNally (Tr. 296).

I knew also that the Class A holders got one share of new common for each share of Class A. At the time I voted, my wife, my family and I had approximately 15,000 shares Class A having a market value in excess of $350,000 (Tr. 297).

TESTIMONY OF OSWALD MALAND

Direct Examination by Mr. Stevens (Tr. 298).

My reasoning for recommending that Levy not sell any part of his stock unless he sold it all was that he had a deal pending on Seaboard which I thought was legally sound and more desirable from his standpoint than the deal that was presented. A question was raised as to why I would approve the Seaboard deal and would not approve a participation by Mr. Levy to recapitalization. I stated that I thought there was a difference between a recapitalization under the Delaware law and a merger, and that under a merger proceeding, if a Class A stockholder objected, he could get a cash compensation for the fair value of his stock, whereas that was not true under the recapitalization as proposed (Tr. 300) * * *. I don't recall any discussion about the position of A stockholders in connection with the reclassification of 7,500 shares to 100,000 shares. * * * There was no definite or prolonged discussion of hazards in recapitalization and I don't recall whether it was 100,000. In discussing hazards of reclassification I said I thought there was substantial hazard in a reclassification procedure (Tr. 301). * * *

Appellant's Appendix, p. 16:

Cross Examination by Mr. McNally (Tr. 302).

I knew about all of the earlier deals with other companies which Levy seriously considered. I don't recall the exact figures, but Mr. Levy undoubtedly does and I certainly would rely on the figures as he represents them (Tr. 303-4).

Recross Examination by Mr. McNally (Tr. 306)

The Proxy Statement was submitted to Mr. Adolph Johnson of our office by Mr. Levy (Tr. 306).

TESTIMONY OF MINNIE KRANTMAN

Cross Examination by Mr. McNally (Tr. 313).

Appellant's Appendix, p. 18:

I don't know and never did know whether there is any misrepresentation in the Proxy Statement, Plaintiff's Exhibit 3 (Tr. 328-9). * * * I never told Mr. Shulman to buy Liberty Loan stock or any other kind of stock (Tr. 331) * * *. I can't read right now and I am not the best reader anyway (Tr. 334).

"Mr. McNally: I will be glad to read it to her.

Mr. Stevens: Go ahead."

The letter read to the witness is from Quail & Co., brokers, to Louis Shulman, dated September 1, 1954, and stated in part, "Enclosed is the latest Standard and Poor's write-up on Liberty Loan. To bring it up to date, Liberty now is in the process of merging with the Metropolitan Loan and Investment Company of St. Louis and in the process of getting rid of their convertible preferred and their Class B Common Stock. It is Mr. Lichtenstein's desire to have only one class of common stock * * *. This stock does seem to have an excellent growth factor, though

immediate results can frankly only be hoped for, but with the recapitalization completed and mere mergers considered, growth should be rapid. * * *" (Tr. 335-6). Mr. Shulman discussed this letter with me after the suit was filed, but I can't remember whether it was after or before. I don't think it was before (Tr. 339).

Appellant's Appendix, p. 19:

My dividend checks are all that I am interested in (Tr. 346) * * *. I never communicated with or tried to find or talked to any other Class A stockholders of Liberty (Tr. 347).

TESTIMONY OF DAVID B. LICHTENSTEIN

Direct Examination by Mr. Stevens (Tr. 348).

The first discussion of a stock option plan which I had with Mr. Levy occurred during one of his conversations with me about coming into Liberty (Tr. 349). The general principles of such a plan were discussed with both Levy and Costigan (Tr. 350) * * *. The persons I named were those persons who were coming in with me (Tr. 351). * * * The list which is included in plaintiff's Exhibit 8 was the final list. That list as adopted is not the same as the one submitted to the Board. (Tr. 352) * * *. The names of I. H. Levy, H. H. Levy and Strilky were on the list presented to the Board (Tr. 353).

Appellant's Appendix, p. 20:

My wife's funds have not substantially come from me (Tr. 355). All of the money which she has was made by her own investments from a little money she had when I married her (Tr. 356).

Appellant's Appendix, p. 21:

I talked to Mr. Buford about coming into Liberty before he became a director and I also talked to him about investing in the purchase of B shares of Liberty before he became a stockholder of Key (Tr. 364). * * * Mr. Buford and Mr. John Wilson talked to August A. Busch, Jr. Wilson is Financial Vice President of Anheuser Busch (Tr. 364). * * * I did not talk to Alfred Fleishman, who owns 22 shares of Key. I presume Mr. Buford did (Tr. 365).

Appellant's Appendix, p. 22:

Key Finance still owns the 7241 shares of Liberty B stock acquired in July 1954. It has acquired no other stock (Tr. 367).

The Proxy Statement was prepared by lawyers in Mr. Dallstream's office, but I did read it and tried to read it carefully (Tr. 368).

It would be sort of a misrepresentation to put in the notice that 7500 shares of Class B would be reclassified into 100,000 shares of common because there is so much more contained on the very next page about the plan. The next page says:

> "The plan in substance provides for the conversion of Class A common stock of the corporation into common stock of the surviving corporation on a share-for-share basis, the conversion of 7500 shares of Class B common stock of the corporation into 100,000 shares of the common stock of the surviving corporation, restricted as to dividends as hereinafter provided, the conversion of 2,074 shares of the capital stock of Metropolitan into 20,469 shares of the common stock of the surviving corporation, and the conversion of 100 shares of the capital stock of Metro

into 2730 shares of the common stock of the surviving corporation." (Tr. 369-70)

The notice says:

"Your attention is directed to the attached proxy statement and exhibits which afford you further information concerning the matters to be acted upon at the meeting."

I am sure I discussed what should be on the first page and certainly we would not have put on a fragment of the information (Tr. 370-1). * * *

I dispute the fact that as a result of the merger the 7500 B shares are increased in equity from about $125,000 to $1,400,000, as of the figures in the Proxy Statement, because you are dividing up the company and all of the money belongs to the common stockholders, and you can figure out what one share is worth but nobody has a right to take any part of the money and part of the capital and say, "Well, this belongs to this group". Nobody has a right to do that in any corporation to my knowledge (Tr. 376). There wouldn't be any B stock after the merger. The equity for one share of B stock before the merger as compared with the resulting shares issued for such one B share after the merger is given on page 10 of the Proxy Statement. It talks about all of the stock (Tr. 377). * * * I don't think you can pick out 13⅓ shares and say so much equity belongs to them, but I do think you can pick out the book value of one share and the market value of one share. (Tr. 378) * * * Mr. Stevens also described briefly what the nature of the suit was, complaining about the merger and reclassification of stock and complaining about the Employees Stock Purchase Plan (Tr. 383).

Appellant's Appendix, p. 23:

In meetings with both Levy and Costigan prior to June, 1954, I had always said that I didn't believe Liberty could attract any executives into the company as long as they had the B stock and that they would have to eliminate it.

I do not recall any details being worked out prior to June (Tr. 386). * * * In other words, so long as the Class B stock existed it was possible for Liberty to be controlled by the owner of a majority of the B stock regardless of the amount of the other outstanding stock, and that situation made it impossible to attract executives and top personnel who could never hope to have any major part of control of the company (Tr. 387). * * * I never heard of B stockholders being willing to eliminate their B shares by converting them into A shares on a share for share basis, either as Key Finance or Mr. Levy (Tr. 388-9). Even though the B stock had the same rights of liquidation and the same dividend rights, its right of ownership gave it greater value. The B stock could even sell the company, could sell the assets, and force a liquidation (Tr. 389).

Of the 173,091 shares of A stock for which dealers were paid at the rate of 15¢ per share, between 30,000 and 40,000 such shares did not have any dealers stamp on the proxies; however, the dealers claimed that such shares belonged to their customers and claimed the fee so that as a public relations matter and so as not to ruin the relationship of Liberty with dealers all around the country, Liberty paid the 15¢ per share fee on these shares as well (Tr. 392).

The only thing I can recall ever saying to Costigan concerning the use of security dealers was that in the Ohio Finance deal which occurred some five years previous the dealers were paid for their work in soliciting

and I could have said, and perhaps I did say, that I presume the set-up would have to be similar to what was done in Ohio Finance (Tr. 394). I don't believe I ever talked about it after that. There is nothing unusual in such practice in mergers and matters of that kind. It is a common practice (Tr. 395).

Appellant's Appendix, p. 24:

My general policy was deviated from in connection with H. H. Levy and Louis Strilky because I could assure myself that they would not go into business and compete and take a lot of employees with them plus a lot of customers (Tr. 396) * * *. I don't think that the 20% stock held by Barnes by itself was sufficient to control the directors of American Investment (Tr. 398).

As a mathematical matter anybody can multiply 13⅓, which is mentioned in the Proxy Statement in a number of places, for example page 7, where it says that each share of Class B Common Stock will be converted into and exchanged for 13⅓ shares of Common Stock of the surviving corporation, by $14.17, which is stated on page 10 of the Proxy Statement as being the value per share of the common stock after the merger and after giving effect to the Employees' Stock Plan (Tr. 403-5). * * * I do not think you can take a group of stockholders and segregate them after there is one class of common stock (Tr. 405). * * * I think the figures would be correct if there were a liquidation on the basis of the figures stated in the Proxy Statement, but we did not go into this company to liquidate it (Tr. 407-9). The Proxy Statement says very plainly, in chart form on page 10 that is so easy to see, just what the book value figures would be (Tr. 409). * * *

Appellant's Appendix, p. 25:

But I can find the value upon liquidation of the 100,000 shares exchanged for the Class B shares (assuming liquidation and book value to be the same) by taking the per share basis. I do not think it takes an accountant to multiply 100,000 by $14.17, which is the book value of one share after the merger (Tr. 411-12). * * * The book value of all the shares after the merger was changed (Tr. 413).

"Mr. McNally: Mr. Stevens, is it not simpler to put it as it was in the proxy statement per share? Mr. Lichtenstein will have to multiply it. It is there per share on page 10 and it is there in the proxy statement.

The Court: The proxy statement shows it per share. How many shares were there?

Mr. McNally: It shows it right there on the same page.

The Court: There is no harm in asking him the question. Let him multiply it. (Tr. 416).

* * *

The Court: Since he has stated he does not know, if you wanted something accurate, it is set out in the statement at so much a share, give him the number of shares and the amount, and let him multiply it so you will have the record clear. * * *

The Court: You have two things. First you have the Class A shares, that you are asking him. That was at a fixed price. What was that? Multiply that. Then the same number of Class A shares—

Mr. Stevens: After.

The Court: —at the new book value after the merger, and what was that? (Tr. 417).

Mr. Stevens: Yes, that is exactly.

The Court: And then you have your difference.

Mr. Stevens: That is it exactly.

The Court: Your theory of the case is that there was a dimunition of the one and an increase of the other, based on book value.

Their theory of the case is that it is a matter of determining the value and that the book value is not the true and correct value because of the element of ownership.

Mr. Stevens: That is right.

The Court: Ownership and control (Tr. 418).

* * *

By Mr. Stevens:

Q. Mr. Lichtenstein, during the recess you have been making some computations as to the book value of the 449,606 shares before and after the merger, have you not? (Tr. 419) * * *

The Court: Isn't the important thing how much it shrinks per share?

Mr. Stevens: That isn't the only thing.

The Court: That is a matter of arithmetic, the rest of it, isn't it? If it shrinks so much, if there is a shrinkage, if you assume there is a shrinkage at so much each share, it is a matter of arithmetic, your client lost so much, if there was a loss, and each other shareholder lost proportionately, and if there was a gain the B shareholders gained proportionately. Your complaint now is that that was not totalized?

Mr. Stevens: That is right. They don't present the whole picture to the shareholders.

The Court: They didn't present it and say this is going to be the total book value before and this will be the total book value after? * * *

I just want to get your theory.'' (Tr. 421-2).

* * *

(The witness, continuing): I suppose I could have taken the 449,606 figure and multiplied by $14.17 per share if

I wanted to, but it doesn't apply; I don't think it is comparable before and after the merger. (Tr. 423).

* * *

"Mc McNally: But the body of stockholders can now, if they ever see fit, dispose of Mr. Lichtenstein and his management". (Tr. 425)

(The witness, continuing): There is no dollar comparison of the dividends before and after because they did not know whether the dividends would be the same or would be increased (Tr. 430). The dividend explanation is perfectly plain in the proxy statement. It states at page 9, after pointing out that the 100,000 shares exchanged for the B stock could only receive 7½% of the dividend on the non-restricted common stock until after 90¢ a share has been earned for a period of six months on all of the outstanding stock, "Thereafter such 100,000 shares of common stock will be entitled to receive dividends on the same basis as the other outstanding shares of common stock of the surviving corporation". In the financial statements on page F-6 the dividends paid on the Class A stock for prior years are shown at the rate of $1.50 per share (Tr. 432), also the dividends paid on the Class B stock for prior years at the rate of $1.50 per share (Tr. 433). The proxy statement says that after the restriction has been removed the dividends on the 100,000 shares will be on the same basis as the other stock. (Tr. 433)

"By Mr. Stevens:

Q. Yes, but nowhere in there is the figure $150,000 as such mentioned as a dividend for the 100,000 shares, is it?

The Court: Counsel, those are matters that they look at and determine.

Mr. Stevens: Well, all right. That is right.

The Court: The total is there. Your complaint on that score is that they didn't total it up and say this, that and the other. They have given the breakdown rates—

Mr. Stevens: That is right.

The Court: —so that the person who looks at that or has his counsel look at it would be able to determine these figures. I could determine it myself, because the breakdown figures are there.

Mr. Stevens: Yes.

Mr. McNally: There is also a very complete explanation in the long paragraph at the top of page 11 immediately following the table on page 10. (Tr. 433-4)

Cross Examination by Mr. McNally (Tr. 441).

Appellant's Appendix, p. 26:

These employees did not get their stock for nothing; they paid $17 a share and have a contract to pay the balance of the stock that is partially paid. We doubted whether Liberty could have sold the stock for $17 a share; after paying commissions, it would have gotten something less because they had sold preferred stock for less, and the company was not in as good a condition as when it sold the preferred (Tr. 441). * * * The price to the employees was below the market value on 100 shares, but not much, and if you take off commissions that would have to be paid to dealers it would come to something less than $17. (Tr. 442) * * * They could not sell the stock until after they got it and then not until 30 days thereafter (Tr. 444).

"The Court: Let's see. He could not sell—if he contracted for 100 shares he would not until the end of the five year period and the 30 days thereafter, he would not be able to sell any part of the 100 shares, is that right?

The Witness: No. That is not quite right.

The Court: Then if he contracted for it and he paid up part of it and some of it was issued to him as he went along, then 30 days after it was issued to him, he could?

The Witness: That is correct. (Tr. 445)."

Appellant's Appendix, p. 27:

The Board of Directors voted to permit me to have, on my coming into the company and bringing the groups that I brought in, 68,000 shares of stock, and they also under the plan authorized me to designate other members of my family or family trusts to take such part of the shares provided they pay for it, and that is what I meant by designation in replying to Mr. Stevens' questions concerning the portions of the 68,000 shares taken by my wife and the trusts for my two sons (Tr. 446-7).

In all the time I have worked I never did fix my own salary and I accepted what the directors gave me. * * * If the Board wants to fix less than $72,000 a year it is all right with me (Tr. 448). * * * I said that their top executives would have to reduce their salaries so as to afford sufficient funds to pay the executives that we were bringing in. We scaled it down that way.

The Court: So what your plan was that the over-all expenses in the future would not exceed what it had in the past, is that right?

The Witness: For the executive salaries.

The Court: How would you take care of your salary? (Tr. 449)

The Witness: I would have to earn it first, and that is one reason I did not take any salary, because we were working on the 90 cents. This year there is the possibility that I would be entitled to salary if the board so desires to give it, because we are earning about 50 per

cent more in total dollars than Liberty ever earned in its life.

The Court: There was no contract or agreement, though, that you are not entitled to salary until you had earned the 90, was there?

The Witness: No, sir, that was voluntary on my part (Tr. 450).

(The witness, continuing): These publications included information as to Metro, Metropolitan, the Employees' Stock Plan and all the other elements. All of the transactions attacked by this suit were covered (Tr. 454).

Appellant's Appendix, p. 28:

Starting July 20, 1954 we opened additional offices and put in an immediate training program, which Liberty did not have, to educate young men to be office managers, then later supervisors and other officials (Tr. 455). * * * The sales finance business required an entirely new training program for many of the men, mostly old Liberty employees, because it was a different type of business (Tr. 456). * * * We have put in $6,500,000 worth of subordinate notes sold to insurance companies in this country, and we have just closed a deal for a million dollars on a junior subordinate note, which enables us to borrow more from the banks. * * * We have signed commitments with some of the leading insurance companies for $8,500,000 worth of senior notes (Tr. 457). The banks and the insurance companies have about three times as much money in this business as the common stockholders have (Tr. 458). * * * The banks and insurance companies receive our regular audit reports, special reports which they request, and frequent personal calls from our representatives. The banks and insurance companies complimented us in regard to the plan and merger and said we were

doing a fine job and that it was the thing to do to make Liberty grow (Tr. 459). * * * Outstandings are the accounts receivable, which are the earning assets of the company (Tr. 461). * * * The stock of Liberty has done better market value wise than other companies in the industry because Liberty is a growth company and is so recognized by investors and by brokers all around the country (Tr. 462). * * * People are buying Liberty stock for appreciation (Tr. 463).

Cross Examination by Mr. Strachan (Tr. 464).

Appellant's Appendix, p. 29:

American Investment Company was willing to pay $1,700,000 for the Class B stock in 1950 and 1951 (Tr. 465). In 1953 American was willing to pay $1,500,000 for the Class B stock, which price was not acceptable to Mr. Levy and he refused it (Tr. 466).

We have not paid salaries to any person that did not work for them. I would not be a party to such an agreement (Tr. 467).

* * *

Liberty had had no prior contact with this Chicago insurance company (Tr. 468). * * * Mr. H. H. Levy's contract was terminated in accordance with its terms when he came down with a very severe cancer (Tr. 469).

Mr. Strilky does have a following because he knows the personnel in and around Chicago and Wisconsin. He could have damaged the company if let out and it wouldn't have been fair to let out a sick man without considering the approximate 30 years spent with the company. His work was in Chicago (Tr. 471). * * * A major part of the company's work is in Chicago, only the executive offices being in St. Louis (Tr. 472).

The purchase of B stock by Key Finance did not involve in any way a reclassifiscation of the B stock into

common stock or any other reclassification. There were no agreements whatsoever. * * * When we started, Liberty was in 6 or 7 states (Tr. 473).

Redirect Examination by Mr. Stevens (Tr. 474).

Appellant's Appendix, p. 30:

Each share of stock purchased under the Employees' Stock Plan had equal voting rights with every other share of stock as prescribed by the Delaware statute (Tr. 474). The $2.19 earnings per share as of May 31 was also for the five months of this year, and based on all the shares including the 100,000 shares and all the employees' stock that had been issued (Tr. 475). On eighty some thousand shares of employees stock only 1/17th had to be earned (Tr. 475).

Loan companies such as Commercial Credit and CIT Finance Corporation are not in our field (Tr. 477). * * * Many brokers have told me that our stock had responded better than any of the other stocks in the industry. There may be an exception, but I don't know what it is. Household went up and came down again and may be about the same as 1954 (Tr. 478-9).

DEPOSITION OF EDWARD J. COSTIGAN

Direct Examination by Mr. Stevens (Tr. 488).

We might have had 25,000 shares in the hands of our customers in 1954 (Tr. 490). * * *

Appellant's Appendix, p. 31:

There were a lot of other things our firm did; among others, we helped to bring out a class of stock that had full voting rights and to restore the voting power to the common stockholder, and we also helped in the exchange

of the Class B stock for the common stock (Tr. 493). The proxy statement contained factual information. Possibly some of our salesmen could have presented the information so that the stockholder would understand what was in the proxy statement, if you know what I mean (Tr. 495). * * * Customers are different, and you can't generalize on it (Tr. 497). There has been no additional compensation received by and no promise of additional compensation given to Edward D. Jones & Co. (Tr. 498). We never expected to receive compensation for assisting in the sale of the B stock from Levy and his family to the group headed by Lichtenstein (Tr. 499). The only compensation that we could ever have expected to get and which was never decided on until the very last minute was the $7500 and the 15¢ a share (Tr. 501).

Appellant's Appendix, p. 32:

I was not active in the Seaboard negotiation * * * I am not familiar with any arrangement that as part of the sales agreement Mr. Levy was to get a $40,000 a year salary for five years (Tr. 504). * * * Lichtenstein wanted to work out a basis of compensation because he wanted to keep Levy's services, but it was a very general conversation about possible compensation (Tr. 506-9).

In April, 1954, there probably was a discussion of a requirement that the Class B shares be reclassified into approximately 100,000 common shares (Tr. 514-5). * * * Maland was afraid of the Class A stockholders and satisfying them because a recapitalization would be required (Tr. 530).

Appellant's Appendix, p. 33:

Both Riter & Company and Fairman and Harris had in 1954 a large number of customers and had a number of the Class A stockholders of Liberty (Tr. 536). * * * Mr.

Nix was opposed to about everything we were doing and not against any particular question (Tr. 537). The reason he was opposed to Mr. Lichtenstein coming into the picture was because it would have interfered with his Seaboard Finance deal (Tr. 539). * * * I might have mentioned to Mr. Nix in New York in March that there might be some compensation to dealers for soliciting proxies (Tr. 542-3). It was necessary to reclassify the B stock in order to put the voting power in the hands of the A stockholders and to provide management, and Lichtenstein would not have put up $1,700,000 to come into Liberty without the idea of working toward a reclassification of the stock. I imagine Lichtenstein told me that; it could have been mentioned in a very general way at our first meeting in March, 1954. Mr. Levy was not present. I don't remember having said to either Mr. Harris or Mr. Nix that reclassification was a condition (Tr. 544-5). At the Chicago Club in the latter part of May, 1954, I don't know that I said anything to Mr. Nix other than the fact that in order to provide management, outstanding management that Lichtenstein provides, Lichtenstein would not come in unless this B stock were out of the way and the voting power was in the hands of the Class A or the common stockholder; that you would never attract good management into a company with the capitalization the way it then existed so that in order for Lichtenstein to pay $1,700,000 and come out, you had to have 100,000 shares, which then was about the market value of the other stock which was around $17 a share (Tr. 546).

Appellant's Appendix, p. 34:

Mr. Harris was not opposed to the reclassification of 7500 shares to 100,000 shares. I think he was in hopes that there might be a lower figure (Tr. 548). He did not really feel that way. It was sort of a trading attitude

(Tr. 549). Nix' opposition was against everything having to do with the plan. His whole idea was dragging his feet in hopes he could have the Seaboard deal (Tr. 549-50). * * * Everybody knew that the dividends were $1.50 on the B stock. I don't think Lichtenstein and I discussed that the total dividend on the B Class was $11,250. Everybody knew that it was $1.50 times 7500. (Tr. 553-4).

Cross Examination by Mr. McNally (Tr. 555).

My wife and I and some of my sisters owned Class A stock before the reclassification and had held it for some years prior to July, 1954. Jones & Co. had sold about 25,000 shares of Class A stock to customers (Tr. 556). * * * When Lichtenstein in the early part of 1954 was on leave of absence from American, I did everything I could to try to get him into the management of Liberty because I consider him the outstanding man in the industry. The Class A stockholders would be very lucky to have a man like him identified with Liberty. I consider management 95% of any operation. That was my primary interest in trying to bring Lichtenstein into Liberty (Tr. 557). I have been in the business since 1937; our firm has handled small loan securities back to 1932. We handled a lot of Ohio Finance securities which eventually went into American Investment. I saw how Ohio fared with poor management and when it went into American I saw how very well they did. I got to know Lichtenstein well as a result of it (Tr. 558). * * * The regard and respect of the investment men and commercial bankers extended to his outstanding managerial ability, establishing training programs with personnel, opening new offices. People in his organization have the highest regard for him. Being identified with American Investment and Ohio Financing over the past years, we naturally learned that, because we have to know what we are selling. We consider management

95% of whether a company is going to succeed or fail. Our brokerage concern is still dealing in Liberty stock and the sales are substantially greater than before. Possibly 75,000 shares are in the hands of our customers. We have sold a terrific amount (Tr. 559-60).

Cross Examination by Mr. Strachan (Tr. 561).

Appellant's Appendix, p. 35:

Mr. Levy has a reputation for making desirable acquisitions for a company. * * * He still is Chairman of the Board, having been elected and re-elected at each annual meeting of directors (Tr. 562).

Redirect Examination by Mr. Stevens (Tr. 564).

The 4,000 shares owned by my relatives and myself were Class A shares (Tr. 564-6). * * * Before Mr. Lichtenstein came into Liberty, the company was not making good progress in the increase of its receivables like other companies were doing in the industry. In fact, their receivables were going off a little (Tr. 568). This was a very poor showing by comparison with other small loan companies in the industry for the preceding year. The company was not showing the growth that we wanted and therefore we thought it imperative that a man of Lichtenstein's ability be brought in; and when he became available, that is what we wanted. * * * Mr. Levy could not do everything (Tr. 569). He is a hard worker, he does a good job and is a great man for Liberty; but our organization was not deep enough in management all the way through, all the way down to the managerial level, in order to provide the kind of growth that we wanted. Bringing in Lichtenstein and his group of managers and executives would give us the kind of management we wanted, and we got it (Tr. 570). * * * Liberty primarily lacked depth all the

way down through its organization. This lack of managerial talent in addition to executive talent was a very important consideration (Tr. 571).

Recross Examination by Mr. McNally (Tr. 578).

My favoring of the plan was not motivated by a selfish interest of my own as to what I or my firm might receive in the way of any dealer's fee, but rather by what was best for the Class A stockholders (Tr. 579).

Recross Examination by Mr. Strachan (Tr. 580).

Our primary interest was to get the management in for Liberty. I thought that the interests of the Class A stockholders would be better served by this plan of bringing in management than by combining Liberty with a company like Seaboard. * * * The same growth possibilities did not exist in Seaboard (Tr. 581).

COLLOQUY ON ORAL ARGUMENT.

"Mr. McNally: Barrett v. Denver Tramway Corporation, 146 F. 2d 761, establishes first the rule which I know the Court knows, and that is that the applicable law in this case, the law that governs, is Delaware law.

The Court: I don't think anybody will dispute that—

Mr. McNally: No.

The Court: —but what the law is Delaware law, it being a Delaware corporation.

Mr. Stevens: So far as the substantive law is concerned, there is no question about it.

The Court: I think that goes without saying.

* * *

Mr. Stevens: Of course, this Court has general equity powers. I say the general equity powers of the Court still prevail here, but we should consider the Delaware law.

* * *

The Court: I don't think there is any question about the law. He has to establish fraud. That is his whole complaint.

Mr. Stevens: That is right." (Tr. 606-8)